



## **GULF COAST ECOSYSTEM RESTORATION COUNCIL**

**[Docket Number: 107222016-1111-04]**

### **Local Contracting Preference**

**AGENCY:** Gulf Coast Ecosystem Restoration Council.

**ACTION:** Notice of final policy.

**SUMMARY:** The Gulf Coast Ecosystem Restoration Council (Council) hereby issues notice of its final policy for implementing the local contracting preference requirement of the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act).

**DATES:** *Effective Date:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mark Bisgeier, General Counsel, via email at [mark.bisgeier@restorethegulf.gov](mailto:mark.bisgeier@restorethegulf.gov)

### **SUPPLEMENTARY INFORMATION:**

#### **I. Background**

The RESTORE Act, Public Law 112-141 (July 6, 2012), codified at 33 U.S.C. 1321(t) and *note*, makes funds available for the restoration and protection of the Gulf Coast Region through a new trust fund in the Treasury of the United States, known as the Gulf Coast Restoration Trust Fund (Trust Fund). The Trust Fund will contain 80 percent of the administrative and civil penalties paid after July 6, 2012 under the Federal Water Pollution Control Act by responsible parties in connection with the *Deepwater Horizon* oil spill. These funds will be invested and made available through five components of the RESTORE Act. On December 14, 2015, the Department of Treasury (Treasury) issued final regulations (80 FR 77239) applicable to all five components that generally describe the responsibilities of the Federal and State entities that administer RESTORE Act programs and carry out restoration activities in the Gulf Coast Region.

Two of the five components, the Comprehensive Plan Component (sometimes referred to as the Council-Selected Restoration Component) and the Spill Impact Component, are administered by the Council, an independent federal entity created by the RESTORE Act. Under the Comprehensive Plan Component (33 U.S.C. 1321(t)(2)), the subject of this policy, 30 percent of the amount in the Trust Fund will be used to fund the operations of the Council and to carry out projects and programs adopted in the Council's Comprehensive Plan. An Initial Comprehensive Plan was adopted by the Council in August 2013 and is available at <https://www.restorethegulf.gov/sites/default/files/Final%20Initial%20Comprehensive%20Plan.pdf>.

Pursuant to the RESTORE Act at 33 U.S.C. 1321(t)(2)(D)(ii)(IV)(dd), on December 9, 2015, the Council finalized a Funded Priorities List (FPL) to be included as part of the Initial Comprehensive Plan, setting forth programs and projects to be funded and prioritized for further review. These programs and projects will help to restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches and coastal wetlands of the Gulf Coast region. The FPL is available at

[https://www.restorethegulf.gov/sites/default/files/FPL\\_FINAL\\_Dec9Vote\\_EC\\_Library\\_Links.pdf](https://www.restorethegulf.gov/sites/default/files/FPL_FINAL_Dec9Vote_EC_Library_Links.pdf).

Programs and projects selected for funding in the FPL will be funded either through grants to the State members of the Council (the Governors of the States of Alabama, Florida, Louisiana, Mississippi, and Texas) (State or States) or interagency agreements with the Federal members of the Council (the Secretaries of the Departments of Agriculture, the Army, Commerce, the Interior and the Department in which the Coast Guard is operating, and the Administrator of the Environmental Protection Agency). Those State and Federal members of the Council may in turn award grants or contracts to carry out the funded programs and projects.

## **II. Discussion of This Policy and Response to Public Comments**

The RESTORE Act requires the Council to “develop standard terms to include in contracts for projects and programs awarded pursuant to the Comprehensive Plan that provide a preference to individuals and companies that reside in, are headquartered in, or are principally engaged in business in a Gulf Coast State.” 33 U.S.C. 1321(t)(2)(C)(vii)(V). On May 22, 2015, the Council published in the Federal Register notice of its preliminary interpretation of this local contracting preference and described its proposed implementation of that interpretation (80 FR 29708). Public comment was requested and three public comments were received, one each from a private individual, a non-profit organization and a consortium of Gulf Coast organizations and businesses. The latter two commenters made similar recommendations and are addressed together.

Preliminarily, due to differing legal requirements in the various jurisdictions, the Council will apply the local contracting requirement at the Federal level (see comment topic 2 below) while permitting each State to apply any local contracting preference in conformity with local requirements. The Council will

therefore not impose on the States any special grant award conditions requiring a local contracting preference or related contractual certifications. Each of the States has enacted laws pertaining to local contracting preferences, most of which do not address preferences for another State's local firms; in some cases such laws prohibit preferences for another State's local firms. If the Council were to require the States to provide preferences for another State's local firms, those States with prohibitions against such preferences would be unable to participate in the grant program. Having one or more of the States ineligible to receive grants under the Comprehensive Plan Component would be inconsistent with the intent and purposes of the RESTORE Act. Council policy for State contracting action using RESTORE Act funds is therefore to have each State act in conformance with its laws with respect to contracting preferences, with no further requirements. This policy is consistent with 2 CFR part 200.319(b), which permits grant recipients to apply state or local geographic preferences in the evaluation of bids or proposals only where a Federal statute, such as the RESTORE Act, expressly mandates or encourages geographical preference.

*Comment topic 1:*

The private individual recommended that any local contracting preference not detract from existing Federal acquisition requirements, particularly those related to small business programs.

*Response to comment topic 1:*

The Council will comply with all applicable Federal acquisition requirements.

*Comment topic 2:*

The two comments from the non-profit organization and the consortium of organizations and businesses included arguments for a stronger local contracting preference, especially at the Federal level, and recommendations for various certifications and local workforce development plans, training and hiring

process provisions.

*Response to comment topic 2:*

At the Federal level, a local contracting preference is permitted only when a statute expressly authorizes or requires it. See 41 U.S.C. 3304(a)(5). The Council has determined that 33 U.S.C. 1321(t)(2)(C)(vii)(V) provides such an express authorization. To implement this at the Federal level, in May 2015 the Council proposed requiring federal agencies to either (1) provide a preference to Gulf Coast firms if proposals are determined equivalent under all other evaluation factors, or (2) include a weighted evaluation factor providing a preference to Gulf Coast firms (80 FR 29709). The non-profit organization recommended revising option (2) such that the agencies would be required to provide an explicit weight of 20% to the weighted evaluation factor. The Council has declined to do so. Assigning a specific weight to the local contractor preference factor unnecessarily limits the discretion of the contracting agency to tailor evaluation factors and their relative weights for each procurement. Further, contracting agencies are not required to assign specific percentage weights to each evaluation factor and doing so can result in a more quantitative than qualitative analysis of subjective evaluation factors. Agencies may use a variety of rating schemes, and requiring them to assign a specific percentage weight to the local contracting preference factor would be overly prescriptive and have the effect of restricting their ability to determine what constitutes best value for procurements on a case-by-case basis.

Instead of assigning a specific weight or otherwise changing the two foregoing options, the Council has instead decided to provide Federal member contracting agencies with a third option of including in contracts a financial incentive that rewards contractors for specific local hiring thresholds. Because this third option provides an explicit financial incentive, the Council believes that it may actually make achieving a local hiring objective more likely than either of the other options. The Council thanks the commenters for encouraging the Council to devise a more robust and creative option to encourage local

contracting.

The two comments also included suggestions to include various certifications and contractual clauses to require offerors to develop and submit local workforce development plans and train local workers, and various mechanisms to process job opportunities through state and local hiring agencies. The Council declines to add these additional requirements for two reasons: first, the Council believes that requiring local training is beyond the scope of the RESTORE Act provision for a local contracting preference; and second, the Council is concerned that adding such additional requirements may actually discourage or inhibit local contractors from offering to undertake the work. It is the Federal members' collective experience that additional requirements can be burdensome to the point that potential offerors are discouraged from even participating in the contract proposal process. This is especially true with small, possibly local firms. Potentially discouraging local firms from participating would be inconsistent with the purpose of the local contracting preference.

The Council believes that offering the choice of one of the three options discussed above would provide Federal agencies with sufficient discretion to make an award to an offeror whose proposal provides the best value to the Government. Furthermore, in order to prevent a Gulf Coast firm from serving as merely a pass-through for a firm outside the Gulf Coast region or other avoidance the objective of the preference, to be considered a "local firm" an offeror must certify that it resides, is headquartered or is principally engaged in business in a State. The offeror must also agree that it will perform at least a minimum percentage of the work under the contract with either local employees or local manufacturing, as the case may be. The method for determining whether an offeror meets these tests is adapted from the Small Business Administration's regulation found at 13 CFR 125.6.

### **III. Provisions in Council Comprehensive Plan Interagency Agreements with Federal Members**

The text below will therefore be included in all solicitations by federal Council members for Comprehensive Plan Component contracts, and will be incorporated into all awards for such contracts.

*(a) The offeror represents as part of its offer that it ( ) is, ( ) is not a firm residing, headquartered or principally engaged in business in a Gulf Coast state. For purposes hereof, a “Gulf Coast state” is any of the states of Alabama, Florida, Louisiana, Mississippi or Texas.*

*(b) If the offeror (1) is a firm residing, headquartered or principally engaged in business in a Gulf Coast state and (2) agrees to the following applicable provisions and submits supporting documentation with its offer, then for purposes hereof the offeror will be deemed a “Gulf Coast Firm”:*

*(i) For a contract for services (except construction), the offeror will perform services representing at least fifty percent (50%) of the total labor costs under the contract with employees that are residents of a Gulf Coast state;*

*(ii) For a contract for supplies or products (other than procurement from a non-manufacturer of such supplies or products), the offeror will manufacture, within a Gulf Coast state, such supplies or products representing at least fifty percent (50%) of the total manufacturing costs under the contract (excluding costs of materials); or*

*(iii) For a contract for general construction services, the firm will perform services representing at least fifteen percent (15%) of the total labor costs under the contract with employees that are residents of a Gulf Coast state.*

*(c) For purposes hereof, a “resident of a Gulf Coast state” means a resident as defined by the applicable Gulf Coast state law.*

Additionally, one of the three options, generally in the form set forth below, will be included in all solicitations for Comprehensive Plan Component contracts by federal Council members. This term notifies prospective offerors that the Federal member contracting agency will either prefer Gulf Coast Firms in awarding Comprehensive Plan Component contracts or will include an incentive for contractors that perform the contracts using a certain percentage of residents of a Gulf Coast state.

Option 1 provides a preference to Gulf Coast Firms if proposals are determined to be equivalent under all other evaluation factors.

Option 2 provides a weighted evaluation factor providing a preference to Gulf Coast Firm offers. The solicitation should identify the relative weight of the local contracting preference to the other stated evaluation criteria.

Option 3 provides a financial incentive to contractors that perform the contract using a certain percentage of residents of a Gulf Coast state.

*[Option 1] It is the policy of [contracting agency] to encourage the participation of Gulf Coast Firms in the procurement process. This solicitation includes a preference for Gulf Coast Firms. If [contracting agency] determines all other factors to be equivalent, [contracting agency] will give preference to a Gulf Coast Firm. [contracting agency] will review your Gulf Coast Firm status at the time the contract solicitation closes.*



[Option 2 – to be assigned relative weight by the contracting agency] *It is the policy of [contracting agency] to encourage the participation of Gulf Coast Firms in the procurement process. This solicitation includes a preference for Gulf Coast Firms. The [contracting agency] will review your Gulf Coast Firm status at the time the contract solicitation closes.*

[Option 3 – Prescription]

*It is the policy of the [contracting agency] to encourage contractors to hire residents of Gulf Coast states in connection with contracts for RESTORE Act Funded Priorities List projects. Accordingly, [contracting agency] will include the following Local Hiring Incentive Award provision in any contract for which [contracting agency] authorizes such an award.*

[Option 3 -- Contract Provision]

*(1) To qualify for the Local Hiring Incentive Award set forth in section (2) below, a contractor must, on or before [deadline date], submit to the cognizant contracting officer documentation verifying that during the contract's performance period (i.e., base period, option period), on average at least [percent] of the [contractor's employees and/or consultants and/or subcontractor employees] performing work on the contract were residents of a Gulf Coast state.*

*(2) If the cognizant contracting officer confirms in writing that the contractor has satisfied the requirements of section (1) above, then subject to any applicable appropriations laws the contractor will be entitled to receive an award ("Local Hiring Incentive Award") equal to [percent] of the contract amount earned during the contract's performance period.*

Will D. Spoon,

Program Analyst,

Gulf Coast Ecosystem Restoration Council.

[FR Doc. 2016-17328 Filed: 7/21/2016 8:45 am; Publication Date: 7/22/2016]